No. 12,212

IN THE

United States Court of Appeals

For the Ninth Circuit

SHOSO NII,

Appellant,

vs.

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

CLOSING BRIEF OF APPELLANT.

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CLOSING BRIEF OF APPELLANT.

I.

APPELLEE DOES NOT SATISFACTORILY ANSWER ARGUMENT I OF APPELLANT'S OPENING BRIEF.

It was submitted in appellant's opening brief that the Alien Property Custodian does not stand in a same position as a bona fide purchaser under the Hawaiian recording statutes. (Op. Br. pp. 17-20.)

The appellee states in his brief "while we feel that this point need never be reached, we believe that the holding of the District Court is correct" (R. Br. pp.

21-22) appellee does not cite a single case except *Fujino v. Clark,* 71 F. Supp. 1 (D. Haw. by same Judge J. Frank McLaughlin) affirmed on other grounds 172 F. (2d) 384 (C.C.A. 9). The other cases cited are clearly not in point.

The statute under which appellant brought suit is clear on the subject. Section 9 (a) of the Trading with the Enemy Act, 40 Stat. 411, as amended (50 U.S.C. App. (9a)) provides as follows:

> "Any person not an enemy or ally of enemy claiming *any* interest, right, or title in any money or other property which may have been * * * seized by him hereunder and held by him * * * may file with the said custodian a notice of his claim * * * That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish *any* right, title, or interest which he may have in such money or other property. * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia (District Court of the United States for the District of Columbia) or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treas-

> urer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act (chapter) * * *''

It is significant that the statute provides that *"any* right, title or interest'' may be established by persons in position similar to the appellant. It further provides that during the suit the property shall be kept in custody.

Had the properties in issue been sold, would the Alien Property Custodian deny that appellant would have the right to claim for the proceeds if he could establish by competent proof that the properties sold equitably belonged to the appellant and therefore the proceeds should be paid to the appellant?

Appellee must not confuse this case from that where the property is once sold and the claimant sues the bona fide purchaser at such a sale. The recording statute will protect the bona fide purchaser at such a sale. But the present case is not such a case. Section 9 (a) above quoted expressly provides the appellant with a remedy.

II.

APPELLEE DOES NOT SATISFACTORILY ANSWER ARGUMENT II OF APPELLANT'S OPENING BRIEF.

The claim of the appellant with relation to the larger parcel by way of adverse possession was not novel. The claim was expressly made in appellant's complaint. (Tr. p. 6.)

The Court did not make any findings with respect to this theory of the appellant's case. Therefore, the erroneous findings of the trial Court with relation to the gift are relied upon by the appellee.

Findings required under an adverse possession theory and that of parol gift of realty differ greatly. One may not be substituted for the other.

It was obligatory on the part of the trial Court to make fact findings with relation to the claim of adverse possession. And as pointed out in the opening brief, in the absence of such findings this Court may make the required findings.

During the appellant's six years' absence in Japan the appellant's agent was in possession. (Tr. p. 149.) The Court expressly found that Katsutoshi Mikami was appellant's attorney-in-fact. Katsutoshi Mikami's possession could not be that of the appellant's father because the Court expressly found that Mikami was appellant's attorney-in-fact only. This is in answer to footnote 16 at the bottom of page 24 of appellee's brief.

III.

APPELLEE DOES NOT SUFFICIENTLY MEET APPELLANT'S CONTENTIONS IN ARGUMENT III RELATING TO PAROL GIFT OF REAL ESTATE.

The testimony of Eisuke Ikinaga is quoted in a misleading manner by the appellee. (R. Br. p. 11.) The testimony is as follows:

"Q. Now, prior to May, 1935, when Mr. Kaneichi Nii (86) departed for the Empire of Japan, did you have any conversation with him as to what he did with his properties in Hawaii?

Mr. Gross. Objected to as being leading. I will withdraw the objection.

The Court. All right.

A. Yes, I had.

Q. And what was that?

Mr. Gross. If the Court please, now I am going to object to it unless Counsel will fix the time and place and date and who were present so that it will be possible to——

The Court. If anyone were present.

Mr. Gross. That's right, if anyone were present.

Q. (by Mr. Kashiwa). Was there anyone present at the time of that conversation?

A. I do not remember.

Q. Where was this conversation had?

A. After he had definitely decided to return to Japan, he came to me at my garage.

Q. Where was that garage?

A. Waipahu Garage.

Q. With relation to the time Mr. Nii went back to Japan, about how many days or months prior to that was it?

A. I do not recollect exactly but the conversation took place after he had definitely decided to return, and that the (87) baggage and personal belongings were being crated up, which was presumably about three or four days prior to the sailing.

Q. Now, what was the conversation?

A. He told me that he had definitely decided to return to Japan and that all the properties he had in Hawaii he was going to give to Mr. Shoso, his son, and told me that inasmuch as Shoso was a young man for me to look after them as though I were in his place." (Tr. pp. 245-246.)

Eisuke Ikinaga did not testify that he would do anything for the appellant's family. (R. Br. p. 11.) He testified as follows:

"Q. (by Mr. Gross). Then Mr. Kaneichi Nii was an old friend of yours, was he not?

A. Yes, from that time on I associating with him very intimately as own brother.

Q. And you would have done anything that he asked you to do, would you not?

A. Anything that I can do, I'd be glad to do for him.

Q. And you would do anything you could to help his family, would you not?

A. From my first acquaintence with him I associated just like a brother, so I would be willing to do anything to help the family.

Q. And you would still do anything to help Mr. Shoso Nii, would you not?

A. Time is a little different. Time has changed. And I am not at all—I mean the age is different. I was associated with his father so intimately, but

the time has changed and Shoso Nii, due to the difference in age of Shoso Nii and (195) myself, I may not—I may ask you to repeat. It is rather confusing.

Q. Yes?

A. Since I was a very good friend of Nii, and as I have been constantly asked about Nii from Japan to help Shoso Nii, I'd be very happy if I can help Shoso Nii, because I was an old friend of the family."

It must be remembered that Kaneichi Nii is not the appellant.

The appellee states:

"From these four witnesses, on whom appellant relies chiefly, there is no single piece of direct and positive testimony in support of the alleged gift of real property. Indeed, it is difficult to imagine, even inferentially, in what way any of these witnesses supported appellant's claim of gift." (R. Br. p. 13.)

Could any testimony be clearer? How much clearer must one's testimony be before such a serious charge may be made with relation to Eisuke Ikinaga's testimony? The trial Court evidently forgot Mr. Ikinaga's testimony.

Appellee contends that the appellent collected the rents as an agent. An agent accounts to his principal but all of the evidence shows that appellant kept all funds. Appellant paid income taxes not as an agent of Kaneichi Nii but in his own name. These important facts are unimportant to the appellee.

The rental income shown in the tax returns covered income from properties other than the properties in dispute. A careful reading of the transcript pages 275-277 will clarify this.

Appellee's reliance on speculative circumstantial evidence is unwarranted.

IV.

APPELLEE DOES NOT DISPUTE APPELLANT'S RIGHT TO AMEND COMPLAINT.

The appellee apparently admits that under Rule 15 (b) quoted on page 33 of appellant's opening brief that the amendment by way of the amended complaint should have been permitted. Appellee does not in his brief deny the exercise of the said right under said rule.

It is submitted that this amounts to an admission of error on the part of the appellee.

V.

APPELLEE HAS FAILED TO MEET APPELLANT'S CONTENTIONS IN ARGUMENT V OF OPENING BRIEF.

If it turns out that upon final accounting that the amount owing is less than $3169.01, must the appellant still pay the $3169.01?

If he overpays, must appellant again bring a Section 9 (a) suit to recover the overpayment? If not,

what would be appellant's remedy for the overpayment?

Appellee has not answered these questions.

VI.

NO FACT FINDING AS TO SMALLER PARCEL AND TRIAL COURT ERRED IN APPLYING BONA FIDE PURCHASER RULE TO SAID PARCEL.

As for the smaller parcel which was purchased by the appellant the trial Court made no fact findings whatsoever but relied on the rule of bona fide purchaser. The Court stated in its Opinion:

> "And even if I were satisfied with the plaintiff's story—which I am not—as to the larger parcel of real estate and *also as to the smaller one serving as a right of way to the larger tract which the plaintiff bought but oddly took title thereto in his father's name—as to both—a further reason for concluding that the plaintiff cannot here recover is that the Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been.* Any equities which the plaintiff might have had were thus cut off when the property was vested as the father's, and as the records of the Territorial Bureau of Conveyances showed it to be." (Emphasis supplied.)

As submitted in Argument I of appellant's opening brief at page 17, the rule of bona fide purchaser is not applicable in this case. Such being the case the

trial Court must be reversed with relation to the smaller parcel.

CONCLUSION.

It is therefore submitted that the trial Court erred in all particulars as argued in the appellant's opening brief.

Dated, Honolulu, Hawaii,
October 28, 1949.

Respectfully submitted,
SHIRO KASHIWA,
Attorney for Shoso Nii, Appellant.